

STATE OF MICHIGAN
COURT OF APPEALS

SPENCER WOODMAN,

Plaintiff-Appellant/Cross-Appellee,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED

June 24, 2021

No. 353164

Court of Claims

LC No. 17-000082-MZ

GEORGE JOSEPH,

Plaintiff-Appellant/Cross-Appellee,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee/Cross-Appellant.

No. 353165

Court of Claims

LC No. 17-000230-MZ

Before: GADOLA, P.J., and SAWYER and RIORDAN, JJ.

PER CURIAM.

In these consolidated cases brought under Michigan’s Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, plaintiffs, Spencer Woodman and George Joseph, appeal as of right the order of the trial court granting in part and denying in part their motion for attorney fees, costs, and punitive damages. Defendant, the Michigan Department of Corrections (MDOC), cross-appeals from the same order. We affirm in part, reverse in part, and remand for further proceedings.

I. FACTS

On September 27, 2016, MDOC inmate Dustin Szot died after a physical altercation with another prisoner at defendant’s Ionia Bellamy Creek Correctional Facility. The parties do not

dispute that corrections officers discharged Tasers on the inmates to stop the fight, and that it was determined that Szot died from blunt-force trauma.

Plaintiffs are journalists who separately submitted requests under Michigan's FOIA seeking video and audio recordings of the altercation from defendant. Woodman requested "a digital copy of video footage of the confrontation that led to the fatality of inmate Dustin Szot [including] footage from any and all available cameras that captured this incident as well as any available accompanying audio records." Defendant denied Woodman's request, asserting that the records were exempt from disclosure under MCL 15.243(1)(c).¹ Cheryl Groves, defendant's FOIA Coordinator, asserted that disclosure "could threaten the security of [the correctional facility] by revealing fixed camera placement as well as the scope and clarity of the facility's fixed camera and handheld recordings. Disclosure of these records could also reveal the policies and procedures used by staff for disturbance control and the management of disruptive prisoners." Woodman appealed the denial to defendant, which denied the appeal on the basis that disclosing the videos "would reveal the recording and security capabilities of [the correctional facility's] video monitoring system."

Joseph submitted a request to defendant under FOIA for "a digital copy of any and all footage of the September 27, 2016 confrontation that led to the death of inmate Dustin Szot [including] footage from any and all available cameras that captured any parts of the confrontation, including but not limited to cameras installed on tasers deployed [and] any audio records that accompany footage found to be responsive to this request." Defendant denied Joseph's request, stating that "[t]o the extent these records are [available], they are exempt from disclosure under [MCL 15.243(1)(c)]."

Plaintiffs each filed complaints, arguing that defendant wrongfully denied their requests under the FOIA. Plaintiffs asserted that the video recordings were not exempt from disclosure, and requested that the trial court order defendant to provide "a complete, unredacted copy of the Video and any accompanying audio recordings[.]" The parties thereafter agreed to the consolidation of the two cases.

During her deposition, Groves explained that whenever defendant received a FOIA request, the Assistant FOIA Coordinator would review the request, determine what information was exempt, redact information that was not going to be released, and provide Groves with the request and the proposed response. Groves testified that she would review the information and approve the response. Groves further testified that defendant never released video footage, however, denying any such request under the "custody and safety security exemption." Groves testified that no one from defendant's FOIA office reviewed the videos in this case before denying plaintiffs'

¹ MCL 15.243(1)(c) provides that "[a] public body may exempt from disclosure as a public record under this act . . . [a] public record that if disclosed would prejudice a public body's ability to maintain the physical security of custodial or penal institutions occupied by persons arrested or convicted of a crime or admitted because of a mental disability, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure."

FOIA requests for the recordings, but instead complied with the agency policy of not releasing internal video from a correctional facility.

Plaintiffs moved for summary disposition under MCR 2.116(C)(10), asserting that there was no genuine issue of material fact and plaintiffs were entitled to judgment as a matter of law because defendant had violated the FOIA by denying their requests for information. Defendant moved for summary disposition under MCR 2.116(C)(8) and (10) on the basis that the videos were exempt from disclosure under MCL 15.243(1)(a), (c), and (u), and supported the motion with an affidavit from the correctional facility inspector, who averred that the exemptions applied.

The trial court denied defendant's motion for summary disposition under MCR 2.116(C)(8) on the basis that the motion relied on documents outside the pleadings. The trial court also concluded that regardless of whether the exemptions applied, defendant's response to plaintiffs' requests violated FOIA because defendant merely issued blanket denials without reviewing the videos requested. The trial court ordered defendant to produce the videos for an *in camera* review, and held in abeyance the parties' motions for summary disposition pending the review. The trial court permitted defendant to submit the video in a format that obscured the faces of the employees and prisoners in the videos to protect those individuals. Defendant provided the unredacted videos for *in camera* review, explaining that it did not have time to obscure the images of the individuals in the videos and requested that it be allowed to complete this task before disclosure of the videos.

The trial court determined that the videos did not reveal the placement of security cameras, but nonetheless appointed a Special Master to review the videos and report whether the recordings contained any security concerns. The Special Master reported that the videos did not reveal any security concerns except to the extent the videos made it possible to identify staff members and inmates. The trial court ordered that defendant disclose the videos to plaintiffs, but permitted defendant to redact the videos before disclosing them by obscuring the images of individuals in the videos. The trial court denied defendant's motion for reconsideration of its order.

Plaintiffs thereafter moved for attorney fees and costs in the amount of \$211,780.75, and \$2,000 in punitive damages. Plaintiffs asserted that as the prevailing party, they were entitled to reasonable attorneys' fees and costs under the FOIA, and that they were entitled to punitive damages because defendant's decision to deny their FOIA requests was arbitrary and capricious. Defendant argued that plaintiff had prevailed only in part because the trial court allowed defendant to redact the videos, and therefore under the FOIA the award of attorney fees was discretionary with the trial court.

The trial court held that plaintiffs had prevailed in full and accordingly were statutorily entitled to reasonable attorney fees and costs under the FOIA. The trial court found that the attorney fees requested were billed at a reasonable hourly rate and that the number of hours worked was not unreasonable. The trial court observed, however, that plaintiffs had been represented jointly by the law firm of Honigman LLP in a pro bono capacity and the American Civil Liberties Union Fund of Michigan (ACLU). The trial court awarded the ACLU its requested attorney fees of \$14,200, but awarded Honigman only ten percent of its requested attorney fees in the amount of \$19,218.63. The trial court reasoned that it was awarding partial fees because "in this case, dollars have not been necessarily spent except for those dollars that are attributable to counsel for

the ACLU. Instead those were pro bono dollars.” The trial court denied plaintiffs’ request for punitive damages.

Plaintiffs appeal from the trial court’s order, challenging the trial court’s award of the reduced amount of attorney fees and the trial court’s denial of punitive damages. Defendant cross-appeals from the same order, challenging the trial court’s determination that plaintiffs prevailed in full and thus are entitled to attorney fees and costs under the FOIA.

II. DISCUSSION

A. STANDARD OF REVIEW

We review de novo a trial court’s interpretation and application of the FOIA. *Mich Open Carry, Inc v Mich State Police*, 330 Mich App 614, 621; 950 NW2d 484 (2019). We review for clear error the trial court’s factual determinations in a FOIA action. *King v Mich State Police Dep’t*, 303 Mich App 162, 174; 841 NW2d 914 (2013). Whether a defendant acted arbitrarily and capriciously within the meaning of the FOIA is a factual finding that we review for clear error. See *Meredith Corp v Flint*, 256 Mich App 703, 717; 671 NW2d 101 (2003). A finding is clearly erroneous if, after reviewing the entire record, we are left with a definite and firm conviction that a mistake was made. *Nash Estate v Grand Haven*, 321 Mich App 587, 605; 909 NW2d 862 (2017). We review a trial court’s award of attorney fees under the FOIA for an abuse of discretion. *Id.* A trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Id.*

B. ATTORNEY FEES UNDER FOIA

Defendant contends that the trial court erred by concluding that plaintiffs prevailed in full on their FOIA claims and therefore are statutorily entitled to attorney fees and costs under the act. Defendant argues that because it was permitted to respond to plaintiffs’ FOIA requests by providing redacted videos, plaintiffs prevailed only in part in their FOIA claims, and as a result the statute does not mandate the award of attorney fees. By contrast, plaintiffs contend that the trial court correctly determined that they prevailed in full, but abused its discretion by limiting the amount of attorney fees awarded due to the pro bono fee arrangement.

Under Michigan’s FOIA, “all persons . . . are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act.” MCL 15.231(2); see also *Amberg v Dearborn*, 497 Mich 28, 30; 859 NW2d 674 (2014). Michigan’s FOIA therefore generally mandates the full disclosure of public records in the possession of a public body, *Ellison v Dep’t of State*, 320 Mich App 169, 176; 906 NW2d 221 (2017), and is described as a pro-disclosure statute. *Thomas v New Baltimore*, 254 Mich App 196, 201; 657 NW2d 530 (2003). When a request for records is made under the FOIA, a public body has a duty to provide access to the records, or to copies of the requested records, unless those records are exempt from disclosure. *Arabo v Mich Gaming Control Bd*, 310 Mich App 370, 380; 872 NW2d 223 (2015).

If a public body denies all or part of a request for records, the requesting person may commence a civil action in circuit court. MCL 15.240(1)(b). If the requesting person thereafter

“prevails” in that action, MCL 15.240(6) provides for the award of attorney fees, costs, and disbursements as follows:

If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys’ fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys’ fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).

Thus, if a plaintiff prevails completely in a FOIA action, the award of attorney fees by the trial court is mandatory; if a party prevails partially in the FOIA action, the decision to award attorney fees is discretionary with the trial court. *Nash Estate*, 321 Mich App at 606. One “prevails” under MCL 15.240(6) if “the action was reasonably necessary to compel the disclosure [of public records], and . . . the action had a substantial causative effect on the delivery of the information to the plaintiff.” *Amberg*, 497 Mich at 34. “[A]ttorney fees and costs *must* be awarded under the first sentence of MCL 15.240(6) only when a party prevails *completely*.” *Local Area Watch v Grand Rapids*, 262 Mich App 136, 150; 683 NW2d 745 (2004).

In this case, plaintiffs prevailed because their actions were reasonably necessary to obtain the requested videos from defendant. However, plaintiffs demanded in their complaints the production of “a complete, unredacted copy of the Video” Defendant was permitted to redact certain information from the videos, and thus plaintiffs were determined to be entitled to only a portion of the records requested. We therefore conclude that under MCL 15.240(6), plaintiffs prevailed in part. Because plaintiffs prevailed in part in their FOIA claims, whether to award plaintiffs all or an appropriate portion of reasonable attorney fees, costs, and disbursements is discretionary with the trial court. See *Nash Estate*, 321 Mich App at 606; see also *Local Area Watch*, 262 Mich App at 150-151. We therefore vacate the trial court’s award of attorney fees and costs to plaintiffs and remand this matter to the trial court for determination whether, in the trial court’s discretion, plaintiffs are entitled to an award of all or an appropriate portion of reasonable attorney fees, costs, and disbursements.

If the trial court determines in its discretion that plaintiffs are entitled to an award of attorney fees in this case, we observe that “[t]he touchstone in determining the amount of attorney fees to be awarded to a prevailing party in a FOIA case is *reasonableness*,” *Prins v Mich State Police*, 299 Mich App 634, 642; 831 NW2d 867 (2013), and thus the amount of any attorney fees awarded under FOIA must be *reasonable* fees, regardless of the *actual* fees. See *Smith v Khouri*, 481 Mich 519, 528 n 12; 751 NW2d 472 (2008). That is, the question is one of the reasonableness of the attorney fees sought, not the price actually agreed to or paid by the party to his or her attorney, or, in this case, the actual hourly rates and total amounts billed by the law firm to the party. If the trial court determines that plaintiffs are entitled to attorney fees in this case, the trial court should also determine whether the pro bono nature of the representation is a legitimate consideration in the determination of the reasonableness of the fees.

When determining the reasonableness of an attorney fee, the court should first determine the fee customarily charged in the locality for similar legal services, which can be established “by

testimony or empirical data found in surveys and other reliable reports.” *Id.* at 530-532. “This number should be multiplied by the reasonable number of hours expended in the case” *Id.* at 531. The trial court should then consider the following nonexhaustive factors:

- (1) the experience, reputation, and ability of the lawyer or lawyers performing the services,
- (2) the difficulty of the case, i.e., the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly,
- (3) the amount in question and the results obtained,
- (4) the expenses incurred,
- (5) the nature and length of the professional relationship with the client,
- (6) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer,
- (7) the time limitations imposed by the client or by the circumstances, and
- (8) whether the fee is fixed or contingent. [*Pirgu v United Servs Auto Ass’n*, 499 Mich 269, 282; 884 NW2d 257 (2016).]

Building on the Court’s decision in *Smith*, our Supreme Court in *Pirgu* combined the six factors cited in *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982), and the eight factors listed in listed in Rule 1.5(a) of the Michigan Rules of Professional Conduct.² See *Pirgu*, 499 Mich at 281. To facilitate appellate review, the trial court “should briefly discuss its view of each of the factors above on the record and justify the relevance and use of any additional factors.” *Id.* at 282.

C. PUNITIVE DAMAGES

Plaintiffs also contend that the trial court erred by declining to award plaintiffs punitive damages. We disagree. MCL 15.240(7) provides, in pertinent part:

If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall order the public body to pay a civil fine of \$1,000.00, which shall be deposited into the general fund of the state treasury. The court shall award, in addition to any actual or

² In *Prins*, 299 Mich App at 645, this Court stated, “although *Smith* is not a FOIA case, it controls for purposes of determining reasonable attorney fees in FOIA cases” We conclude that *Pirgu*, which was released after *Prins*, is also applicable in FOIA cases.

compensatory damages, punitive damages in the amount of \$1,000.00 to the person seeking the right to inspect or receive a copy of a public record. . . .

A plaintiff is entitled to punitive damages under MCL 15.240(7) only if the defendant arbitrarily and capriciously refused to provide the requested information, and the court ordered disclosure of an improperly withheld document. *Local Area Watch*, 262 Mich App at 153. Here, only the first element, being whether defendant's refusal was arbitrary and capricious, is in dispute. The term "arbitrary and capricious" is not defined by the FOIA. *Prins*, 299 Mich App at 647. In *Laracey v Fin Institutions Bureau*, 163 Mich App 437, 440; 414 NW2d 909 (1987), this Court stated:

Although the terms "arbitrarily" and "capriciously" are not defined in the [FOIA] statute, they have generally accepted meanings. As noted in *Bundo v City of Walled Lake*, 395 Mich 679, 703, n 17; 238 NW2d 154 (1976), citing *United States v Carmack*, 329 US 230, 243; 67 S Ct 252; 91 L Ed 209 (1946), the United States Supreme Court has defined these terms as follows:

Arbitrary is: " '[W]ithout adequate determining principle Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned.' "

Capricious is: " '[A]pt to change suddenly; freakish; whimsical; humorsome.' "

This Court has held that even when a defendant's refusal to disclose records violated the FOIA, the defendant's actions were not necessarily arbitrary or capricious if the defendant's decision was based on "consideration of principles or circumstances and was reasonable, rather than whimsical." *Meredith Corp*, 256 Mich App at 717 (quotation marks and citations omitted). This Court also has found that a denial by the MDOC of a FOIA request based upon the desire to protect employee-witnesses from potential retribution and upon a reasoned belief that internal memoranda were exempt from disclosure under the FOIA was not arbitrary or capricious. *Yarbrough v Dep't of Corrections*, 199 Mich App 180, 185-186; 501 NW2d 207 (1993).

In denying plaintiffs' request for punitive damages in this case, the trial court noted that defendant's response to plaintiffs' FOIA requests was based on legitimate security concerns, and was insufficient not because the security concerns were not legitimate but because defendant had a policy of denying all requests for video footage regardless of the content of the video. MCL 15.243(1) provides, in relevant part:

(1) A public body may exempt from disclosure as a public record under this act any of the following:

* * *

(c) A public record that if disclosed would prejudice a public body's ability to maintain the physical security of custodial or penal institutions occupied by

persons arrested or convicted of a crime or admitted because of a mental disability, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.

* * *

(u) Records of a public body's security measures, including security plans, security codes and combinations, passwords, passes, keys, and security procedures, to the extent that the records relate to the ongoing security of the public body.

In this case, defendant's inspector averred that disclosure of the requested videos would present an increased danger to the unnamed prisoner in the video and to the facility, particularly in light of recent threats against the facility, would reveal the layout of the premises and prisoner movement plans, and reveal the technical capabilities, equipment, and the tactics and procedures defendant's officers use in responding to confrontations. Defendant's denials of plaintiffs' FOIA requests thus were not arbitrary because they were not arrived at "[w]ithout adequate determining principle" or "without consideration or adjustment with reference to principles, circumstances, or significance" *Laracey*, 163 Mich App at 440 (quotation marks and citations omitted). Further, defendant's denials of plaintiffs' FOIA requests were not capricious. Although the record indicates that defendant's routine denial of requests for video footage was an inadequate response under the FOIA, the denials of plaintiffs' FOIA requests were uniform and consistent, and not subject to sudden change. See *id.* Accordingly, the trial court did not err by declining to award punitive damages. See *Local Area Watch*, 262 Mich App at 153.

The trial court's order denying plaintiffs punitive damages is affirmed. The trial court's order determining that plaintiffs prevailed in full and therefore are statutorily entitled to attorney fees, costs, and disbursements under the FOIA is reversed, and this matter is remanded to the trial court for determination within the trial court's discretion whether plaintiffs, having partially prevailed, are awarded any, all, or a portion of reasonable attorney fees, costs, and disbursements. We do not retain jurisdiction.

/s/ Michael F. Gadola

/s/ David H. Sawyer

/s/ Michael J. Riordan